

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of)

Opinion requested by)
Steven S Lucas)

No O-00-157
September 8, 2000

BY THE COMMISSION Steven S Lucas has requested an opinion of the Fair Political Practices Commission on the following question:

I. Question

For purposes of the permanent ban on certain types of post-government employment, is a former Deputy Director of the Board of Equalization deemed to have "participated" in audits conducted by agency employees who were his subordinates even if he had no direct participation in such audits?

II. Conclusion

No An official has "participated" in a decision when the official has taken part "personally and substantially" in it through various enumerated means Where an official who is responsible primarily for creation and implementation of general policies has no such personal involvement in individual audits, the official will not be deemed to have "participated" in those audits for purposes of the permanent ban

III. Facts

The Position of Deputy Director, Sales and Use Tax Department

Glenn Bystrom formerly held the position of Deputy Director, Sales and Use Tax Department at the Board of Equalization ("BOE") Mr. Bystrom was the second highest-ranking employee in the department and was responsible for administrating a portion of the Sales and Use Tax law After 31 years of state service, Mr Bystrom retired from the BOE on January 16, 1998, and joined the accounting firm of Ernst & Young LLP ("E&Y") At E&Y, Mr Bystrom represents various taxpayers on a wide range of tax issues That representation may include contact with the BOE to resolve audit questions

The BOE administrative manual provides the following "functional statement" for the Deputy Director of the Sales and Use Tax Department:

"Under the general direction of the Executive Director, the Deputy Director, Sales and Use Tax, plans, organizes, and directs the agency's sales and use tax

programs Provides guidance and assistance to the Board, the Executive Director, heads of organizational components, and other state agencies

Specific duties of this position are

- 1 Consult with and advise the Executive Director on the administration of sales and use tax programs
- 2 Represent the Executive Director on sales and use tax matters at hearings, meetings and conferences and before legislative bodies
- 3 Direct the development, interpretation, and application of policies, programs, and procedures and direct the administration of the sales and use tax throughout the state
- 4 Recommend changes in the application and interpretation of statutes pertaining to the sales and use tax
- 5 Review and recommend for approval sales and use tax budgets for headquarters and field offices "

There are approximately 2,350 employees in the Sales and Use Tax Department. The Sales and Use Tax Department functions relating to sales and use taxes include (i) registration of sales and use taxpayers, (ii) collection of taxes; (iii) information services, (iv) implementation of new legislation, and (v) performance of audits. The Sales and Use Tax Department performs these functions through its three divisions. The divisions' three chiefs are direct subordinates of the Deputy Director.

The Audit Process of the Field Operations Division

Field Operations is the largest division of the Sales and Use Tax Department. Staffed with approximately 650 tax auditors, the Field Operations Division performs audits of approximately 20,000 taxpayers each year.

The supervisory chain of command for the division's audit function is as follows: Deputy Director, Sales and Use Tax Department, Chief of Field Operations, District Administrator, District Principal Tax Auditor, and Tax Audit Supervisor.

The District Principal Tax Auditor, the highest level in the series of auditors, performs the following duties:

- " Under the general direction of the Deputy Director, [Sales & Use Tax Department], Board of Equalization, develops and interprets uniform policies, programs, and practices for the statewide administration of the

business taxes audit program and directs the Headquarters' audit staff support activities for the business taxes audit program "

An audit may conclude at the Audit Supervisor or District Principal Auditor level, but sometimes the District Administrator is involved. Mr. Bystrom was not routinely contacted by these administrators regarding the audits, and never received an audit status report listing individual audits in progress. Mr. Bystrom only received a quarterly report from the BOE that listed the gross amount of audit production figures.

Mr. Bystrom had no direct role,¹ supervisory or otherwise, in this audit process. Although the broad job responsibilities of the Deputy Director do include administrative oversight of the audit program, the position did not involve reviewing any specific individual audit or audit decision, or otherwise supervising the audits. Mr. Bystrom did render advice, guidance and/or policy that applied generally to all employees of the department, including BOE auditors, or to all taxpayers or all members of a specific class of taxpayers throughout the state.

Audit Appeal Conference Process

Following completion of an audit, a taxpayer may file a "petition for redetermination." Of the 20,000 audits performed each year, approximately 2,000 taxpayers file such petitions. Filing of a petition initiates the BOE's "appeal process," which is handled by the BOE's Legal Division. An Assistant Chief Counsel in the Legal Division is in charge of the appeals. That individual reports to the Chief Counsel, who in turn reports to the Executive Director. The Legal Division falls completely outside of the Sales and Use Tax Department.

In order to resolve a petition for redetermination, the Legal Division holds an appeal conference and resolves approximately 90 percent of the petitions for redetermination through the appeal conference process. Mr. Bystrom had no role in the Legal Division's appeal conferences and never attended such a conference involving any taxpayer.

The BOE Audit Appeal Hearings

The approximately 200 audit matters, or ten percent of the appeal petitions, per year that are not fully resolved through the appeal conference process are referred to the BOE board members for a hearing and decision. At the BOE audit appeal hearings, the Legal Division presents their findings and arguments with respect to the particular audit, which is followed by the taxpayer's presentation of his/her position.

¹ According to Mr. Lucas, only in extremely rare cases would Mr. Bystrom have any knowledge of a specific audit. Mr. Lucas concedes in those cases Mr. Bystrom is permanently barred from representing such individuals. (Op. Req., p. 4)

Although the Deputy Director has no involvement at either the initial audit stage or the appeal conferences held before the Legal Division, the Deputy Director may be called on by the BOE board to answer any administrative questions that the BOE members might have in relation to the appeal hearing. In preparation for the hearing, Mr. Bystrom would review the particular audit file and familiarize himself with the particulars of the given case. Mr. Bystrom concedes the permanent ban applies to these cases.

In summary, there are three levels of audit in the BOE. The first level consists of approximately 20,000 audits commenced at the field level by the first tier of auditors. Of this level, Mr. Bystrom had no supervisory participation in audits. Of these audits, approximately ten percent moved to the next level of appeal, where the file was transferred to the Legal Division of the BOE. Mr. Bystrom had no participation with audit files at this juncture. Of these appeals, roughly ten percent were appealed to the five-member BOE, at which point Mr. Bystrom would become personally involved in the process.²

IV. Analysis

A. Law

1. Sections 87400, 87401 and 87402 Restrictions on Activities of Former State Officers

Under the Political Reform Act ("Act"), there are three categories of post-employment laws. These restrictions apply almost exclusively to state employees (§§ 87400-87407). The first restriction is colloquially known as the permanent ban on "switching sides."³ This ban applies to proceedings involving specific parties, in which the official participated and in which the state is a party or has a substantial interest (§§ 87400-87405).⁴ It is the permanent ban which is at issue in Mr. Bystrom's request. Sections 87401 and 87402 provide.

Section 87401. "No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state

² Mr. Lucas concedes the permanent ban applies to Mr. Bystrom's involvement in audit proceedings in which he participated, such as those that reached the third tier of review before the Board (Op. Req., at p. 4, Adv. Req., at p. 6).

³ The other two are known as "revolving door" laws, which provide for a one-year prohibition on communicating with a former agency regarding legislative, administrative, or other enumerated proceedings (Section 87406), and the prohibition on participating in a matter before an agency affecting a person with whom the state official is negotiating employment (Section 87407).

⁴ Sections 87403-87405 address issues not relevant to this opinion request.

administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply

(a) The State of California is a party or has a direct and substantial interest

(b) The proceeding is one in which the former state administrative official participated "

Section 87402. *"No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401 "*

Section 87400 defines relevant terms for the application of post-employment statutes, and specifically defines "participated," as used in Section 87401

Section 87400. *"Unless the contrary is stated or clearly appears from the context, the definitions set forth in this section shall govern the interpretation of this article*

(d) "Participated" means to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties "

The issue with respect to Mr. Bystrom is whether he "participated" in the approximately 20,000 audits handled annually by his agency while he was employed as Deputy Director, Sales and Use Tax Department. Section 87400 states he has participated in those audits if he has taken part in them "personally and substantially" by means of the described activity.

These statutes were added by legislation sponsored by the Commission in 1979, which became effective January 1, 1980 (Stats. 1980, Ch. 66). That legislation, AB 1048 (Waters), was drafted by the Commission to embody the following principles:

"1. The interests of the government and the public as a former client should be protected by preventing the disclosure or use of matters revealed by reason of a relationship having confidential aspects.

2 The integrity of the governmental decision making process should be protected by insuring avoidance of the appearance of impropriety

3 Both the interests of the government and the public and the integrity of the governmental decision making process should be protected by limitations on the opportunity for undue advantage by reason of familiarity with agency practice and procedure and personal relationships with agency personnel

Against these principles must be balanced:

1 The ability of the government to recruit competent [sic] personnel whose career objectives will require an assessment of the disadvantages of government service

2 The advantage to efficient government operations of having participants in governmental proceedings who are acquainted with practice, procedure and precedent

3 The right of private parties to obtain competent representatives of their own choice " (FPPC Staff Memo to Cmm'n , 2/9/79, pp 1-2)⁵

From the language of the statute and these enunciated principles, it is clear that the prohibition was meant to apply where an official's role is direct and particular to a proceeding involving a particular party or parties

2. Regulation 18741.1 - Participating in the Same Proceeding

In January 1999, the Commission adopted Regulation 18741 1, which sets out a process to determine whether the permanent ban applies The regulation states in pertinent part.

"Regulation 18741.1. Permanent Ban. Participating in the Same Proceeding.

"(a) The prohibitions of Government Code Sections 87401 and 87402 apply to any state administrative official if all of the following criteria are met

(4) The judicial, quasi-judicial or other proceeding includes any proceeding in which the official participated personally and substantially by making, participating in the making, or influencing of a governmental decision, as defined in 2 Cal Code Regs Sections 18702 1 - 18702 4, but excluding any proceeding involving the rendering of a legal advisory

⁵ This policy analysis was adopted in committee analysis as the bill progressed through the Legislature

opinion not involving a specific party or parties. Any supervisor is deemed to have participated in any proceeding which was "pending before," as defined in 2 Cal Code Regs Section 18438.2, subdivision (b), the official's agency and which was under his or her supervisory authority."

The regulation is a codification of agency advice that a former state administrative official is deemed to have participated in all proceedings of her former agency if she was in the agency's supervisory chain for the proceedings during the time of her employment. The Commission adopted this position when it reviewed the *Brown* Advice Letter, No. A-91-033.

3. The *Brown* Advice Letter

At its April, 1990 meeting, the Commission considered whether its former Enforcement Division Chief, Roger Brown, could represent the subject of an Enforcement Division matter whose case was opened just prior to the Chief's departure, and on whose file no substantive work had been done during Mr. Brown's tenure.⁶ Neither Mr. Brown nor his staff could recall any involvement by Mr. Brown in the matter during the brief time he was with the agency while the matter was pending. On this ground, staff, seeking to distinguish the *Brown* matter from previous advice, drafted advice to Mr. Brown which concluded he did not "participate" in the particular case.

The Commission rejected staff's request to issue the draft letter, expressing concern that Mr. Brown's direct supervisory role over the relatively small enforcement division could have impacted matters handled by his subordinates in ways not evidenced by the file. As a result, the staff issued a revised letter concluding Mr. Brown was deemed to have participated in the particular case during his tenure as Enforcement Division Chief (*Brown* Advice Letter, *supra*).

B. Application of Law to Mr. Bystrom

The Commission is called upon to decide whether Mr. Bystrom was "personally and substantially" involved in the 20,000 annual audits commenced by the BOE during his tenure as Deputy Director of the Sales and Use Tax Department. The statute describes "personally and substantially" as participation through "decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information." (§ 87400, subd. (d)).

Mr. Bystrom asserts that in his position as Deputy Director he was charged with no responsibility that comes within the statutory definition of "participated" in Section 87400, subdivision (d), except with regard to the audits that were the subject of appeal before the Board itself, proceedings in which he admits he "participated" and to which he admits the ban applies.

⁶ The complaint letter was received in June 1988, Mr. Brown resigned as Chief in July, 1988, and left the Commission in October 1988.

To the other audits commenced during his tenure that did not reach the full board before his departure, he asserts his role as Deputy Director does not qualify under 87400 as personal and substantial participation. Nor, Mr. Bystrom continues, did he have "supervisory authority" over the 20,000 field audits conducted by the BOE annually while he was with the agency. Accordingly, he does not fall under the "supervisor" ambit of Regulation 18741.1. As a result, Mr. Bystrom concludes, he may represent clients in proceedings before the auditors and Board of the BOE which were commenced during his tenure with the BOE and which did not rise to the third level of appeal before the actual Board.

We agree. The policy concerns manifested in Sections 87400 and 87401 are focused narrowly to apply the ban on same-proceeding involvement only to those proceedings in which the official participated "personally and substantially." Section 87401's definition of "participated" uses clear language setting a definitive threshold of particular activity, less than which does not trigger the Act's permanent ban. Even without resort to legislative history or policy declarations, the plain meaning of the language is clear: there must be, not "general" or "remote" or "any," but personal and substantial involvement, through, "decision, approval, disapproval, formal written recommendation, rendering advice, investigation or use of confidential information." (§87401.)

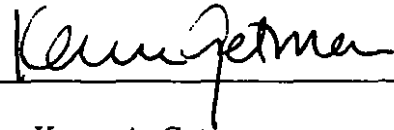
As to the third-tier appeal of audits to the Board itself, Mr. Bystrom concedes that the ban applies. This concession is wise, given that his role at this stage was significant and personal.

In contrast, at field audit and Legal Division review levels, Mr. Bystrom participated neither directly nor indirectly. As his agency description of responsibilities attests, Mr. Bystrom had no direct role, supervisory or otherwise, in these 20,000 audits and 2,000 Legal Division reviews that took place each year of his tenure. Although the broad job responsibilities of the Deputy Director do include administrative oversight of the audit program, the position did not involve reviewing specific individual audits or audit decisions, or otherwise supervising the audits. In fact, those responsibilities were expressly delegated to others in the agency's structure. The *Brown* advice letter, which concerned an official with direct supervisory control over all enforcement matters within the agency, clearly is distinguishable on its facts.⁷

We find Mr. Bystrom's general administrative responsibilities insufficient to rise to the level of "personal and substantial" involvement required by the statute. We caution that nothing in this opinion should be taken to mean that general job classification trumps actual experience. Where, as exemplified in Mr. Bystrom's participation in audits before the Board, there is actual participation by an official in a given matter, that official is permanently disqualified from future participation after leaving state service.

⁷ Staff will be directed to amend Regulation 18741.1 to more clearly reflect this analysis.

Adopted by the Commission on September 8, 2000 Concurring Chairman Getman,
Commissioners Deaver, Makel and Swanson Absent Commissioner Scott.

A handwritten signature in black ink, appearing to read "Karen Getman", written over a horizontal line.

Karen A. Getman
Chairman